DATO' DR SINGARAVELOO MUTHUSAMY & ANOR v. KETUA PEGAWAI EKSEKUTIF/KETUA PENGARAH HASIL DALAM NEGERI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AZIZAH NAWAWI J
[JUDICIAL REVIEW NO: WA-25-237-12-2016]
23 NOVEMBER 2018

ADMINISTRATIVE LAW: *Judicial review – Application to quash decision – Agreement between doctor and hospital – Doctor practised as registered specialist medical practitioner at hospital – Doctor paid rental of clinic at hospital and hospital paid for medical services rendered by doctor – Director General of Inland Revenue ('DGIR') decided that income received by doctor taxable as individual income – Whether agreement was contract for service between doctor and hospital – Whether DGIR empowered to raise any assessment or additional assessment under Income Tax Act 1967 – Income Tax Act 1967, ss. 4(a), 91(1)*

REVENUE LAW: *Income tax – Interpretation of – Agreement between doctor and hospital – Doctor practised as registered specialist medical practitioner at hospital – Doctor paid rental of clinic at hospital and hospital paid for medical services rendered by doctor – Whether agreement was contract for service between doctor and hospital – Whether income received by doctor taxable as individual income – Whether Director General of Inland Revenue empowered to raise any assessment or additional assessment under Income Tax Act 1967 – Income Tax Act 1967, ss. 4(a), 91(1)*

The first applicant ('doctor'), a registered specialist medical practitioner, upon retirement, incorporated the second applicant ('company') to carry on the business as medical practitioners and to provide medical services to in-patients and out-patients in and/or outside hospitals. The doctor signed a 'Resident Consultant Agreement With The Use Of Suite' dated 1 July 2002 ('RTA') with Johore Specialist Hospital Sdn Bhd ('JSHSB'), the owner and operator of Johore Specialist Hospital ('Hospital'), to provide medical consultancy services, as a resident consultant physician at the Hospital. The respondents initiated tax audits on several specialist medical practitioners, focusing on their tax treatment on the income received by the specialist medical practitioner who had set up a Sdn Bhd business and operate their own medical services business in a private specialist hospital. In response to the Malaysia Medical Association's ('MMA') inquiries pertaining to the tax audits, the first respondent ('DGIR') issued a letter dated 9 September 2016 to MMA ('decision'), ruling, *inter alia*, that the income received by the company should be taxed under s. 4(a) of the Income Tax Act 1967 ('ITA') as individual income and not company income. Hence, the applicants commenced the judicial review proceeding as they would also be affected by the decision of the DGIR as their case fell squarely within the ambit of the

decision. However, on 14 September 2016, the doctor entered into a service agreement with the company, whereby, it was agreed that the company, as the employer, had engaged the doctor, as the employee, to provide medical consultancy services as a physician to the Hospital. The case called for an interpretation of the RCA between the doctor and JSHSB.

Held (dismissing application with costs):

(1) The doctor had signed the RCA in his personal capacity. The agreement allowed the doctor to practice his profession as a registered specialist medical practitioner at the Hospital, subject to payment of rental fees and payment for hospital privileges. As for the medical services rendered by the doctor at the Hospital, JSHSB will pay all the money received by the doctor from his patients. Therefore, when the agreement for services was clearly made between the doctor and JSHSB, then all monies and payments from the patients under the RCA rightly belonged to the doctor. Consequentially, all taxes derived from the income of the practice at the Hospital was taxable under the doctor as individual income, not the company's income. (paras 21 & 22)

(2) The doctor contended that based on the service agreement and the fact that the monies received form the patients seen by the doctor at the Hospital were paid by JSHSB to the company, he was in fact acting for the company. However, this was not a relevant consideration as the service agreement was only executed on 14 November 2016, whereas the DGIR's letter was dated 9 September 2016. The payments of professional fees made by JSHSB to the company instead of to the doctor was only an arrangement that was agreed to by the parties. It could not detract away from the fact that it was the doctor (in his personal capacity) who had entered into the RCA with JSHSB. (paras 23-25)

(3) The DGIR had given the RCA its ordinary meaning, in that, the said agreement was a contract for service between the doctor and JSHSB, where the doctor would pay for the rental of his clinic at the Hospital and would receive payments from his patients in consideration of his professional service. There was no forced construction to the said agreement in order to attract tax. As the issue was on the construction of the RCA, there was no issue with regards to whether the medical practitioners were authorised or permitted by law to incorporate a company or body corporate to carry on the business as medical practitioners and to provide medical services. The DGIR had applied the correct principles in the construction of the RCA, in finding that based on the said agreement and pursuant to the ITA, it was the doctor and not the company, who was chargeable and assessable to income tax in respect of the aforesaid monies received from the doctor's patients. (paras 27, 30 & 31)

(4) The decision was made based on discussions with the MMA, applicant's own documents and the DGIR's construction of the same. With regards to the other categories of professionals given a different treatment as contended by the applicants, there was no documentation before the court as to whether their contracts were the same as the applicants. DGIR would only look at each taxpayer's own documents on the issue of taxes and each case will be assessed on its own merits. (paras 33 & 34)

(5) The 2013 audit on the second applicant was not on the tax treatment practiced by the applicants, but rather on the issue of expenses claimed by the applicant, *ie*, the expenses for petrol, parking and toll, filing fees, telephone bills, travelling expenses and printing stationary. In any event, s. 91(1) of the ITA allows the DGIR to raise any assessment or additional assessment if the DGIR is of the opinion that no tax or sufficient tax has been made, and this will include departing from the existing practice and adopting a different form of assessment. Consequently, the decision of the DGIR was legal as it was premised on the construction of the RCA. Hence, there was no merit in the application. (paras 37, 38 & 42)

Case(s) referred to:

Attorney General of Belize & Ors v. Belize Telecom Ltd [2009] UKPC 10 ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Commissioners of Inland Revenue v. Wesleyan & General Assurance Society (1946) 30 TC 11 ***(refd)***

Comptroller-General Of Inland Revenue v. Lim Foo Yong Sdn Bhd [1982] CLJ 459; [1982] CLJ (Rep) 76 FC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Government of Malaysia v. Sarawak Properties Sdn Bhd [1994] 1 CLJ 514 HC ***(refd)***

Syarikat Ibraco - Peremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2015] 10 CLJ 114 CA ***(refd)***

Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2006] 3 CLJ 123 CA ***(refd)***

Legislation referred to:

Federal Constitution, arts. 7(1), 8

Income Tax Act 1967, ss. 2, 3, 4(a), 66, 91(1), 140

For the applicants - T Sudhar & Tanya Edward; M/s Steven Thiru & Sudhar Partnership
For the respondents - Ahmad Isyak Mohd Hassan (PKH); FC

Reported by S Barathi

A

JUDGMENT

Azizah Nawawi J:

Application

B **[1]** This is an application for judicial review seeking the following prayers:

(i) an order of *certiorari* to quash the decision of the respondents by way of a letter dated 9 September 2016 ("decision") addressed to Dr Koh Kar Chai, the General Secretary of the Malaysian Medical Association, ruling amongst others, that the income received by the second applicant should be taxed under s. 4(a) of the Income Tax Act 1967 as individual income and not company income;

(ii) a declaration that the decision is invalid and *ultra vires* art. 7 of the Federal Constitution and accordingly null and void, as it punishes the applicants for the incorporation of a company to carry on business as medical practitioners and to provide medical services ("arrangement") which was not illegal and invalid when the arrangement was made back in 2002;

(iii) a declaration that the decision is inherently unreasonable and arbitrary, as it does not apply equally across the board and is therefore *ultra vires* art. 8 of the Federal Constitution and is accordingly null and void;

(iv) a declaration that the decision is unlawful, invalid and *ultra vires* the Income Tax Act 1967 ("ITA 1967"), as the respondents have exceeded their powers or committed an error of law, in treating the arrangement as a tax avoidance arrangement;

(v) a declaration that the decision is unlawful and invalid, as the respondents have acted unfairly towards the applicants, as to amount to an abuse of power, by retrospectively departing from their previous course of conduct which had led the applicants to reasonably believe at all material times, that the arrangement was lawful and valid;

(vi) a declaration that the decision is unlawful and invalid, as the respondents have breached their duty to treat similarly placed taxpayer alike, by taking an inconsistent approach in their tax treatment of the applicants, as compared to other similarly placed taxpayers; and

(vii) an order of prohibition to restrain and/or to prevent the respondents from implementing the decision to the detriment or prejudice of the applicants.

I **[2]** The grounds of the application are an error of law, that the decision was arbitrary and a breach of legitimate expectation.

[3] Having considered the application and the submission of the parties, this court had dismissed the application with costs.

The Salient Facts

[4] The first applicant, Dato' Dr Singaraveloo a/l Muthusamy (the "doctor") is a registered specialist medical practitioner who has retired from the Government Medical Services in 2002.

[5] On 24 July 2002, the doctor incorporated the second applicant (the "company"), to carry on the business as medical practitioners and to provide medical services to in-patients and out-patients in and/or outside hospitals (see cl. 3(1) of the company's memorandum of articles).

[6] The doctor had signed a resident consultant agreement with the use of suite dated 1 July 2002 ("resident consultant agreement") with Johore Specialist Hospital Sdn Bhd ("JSHSB"), the owner and operator of Johore Specialist Hospital ("hospital"), to provide medical consultancy services, as a resident consultant physician at the Hospital.

[7] The respondents have initiated tax audits on several specialist medical practitioners focusing on their tax treatment on the income received by the specialist medical practitioner who has set up a Sdn Bhd business and operate their own medical services business in a private specialist hospital.

[8] Because of the said tax audits, the Malaysia Medical Association ("MMA") had made inquiries and meetings with the respondent. In response to MMA inquiries, the first respondent ("DGIR") had issued the letter dated 9 September 2016 to MMA, which *inter alia*, reads:

> 2. Harap maklum bahawa pertemuan yang diadakan telah membincangkan perkara-perkara berikut:
>
> 2.1 ISU PERCUKAIAN YANG BERBANGKIT
>
> Isu yang terlibat adalah sama ada pendapatan yang diterima doktor pakar daripada kontrak perkhidmatan dengan hospital pakar swasta adalah dikenakan cukai dibawah perenggan 4(a) Akta Cukai Pendapatan 1967 [Akta 53] atas pendapatan individu atau pendapatan syarikat (dimiliki oleh doktor pakar). Diagram yang jelas menunjukkan situasi persoalan ini adalah seperti di Lampiran 1.
>
> 2.2 KEPUTUSAN KETUA PENGARAH
>
> 2.2.1 Berdasarkan semakan terhadap perjanjian yang telah ditandatangani oleh doktor pakar dan hospital pakar swasta serta dokumen-dokumen yang terlibat, adalah diputuskan bahawa pendapatan yang diterima daripada hospital pakar swasta adalah dikenakan cukai dibawah perenggan 4(a) Akta 53 atas pendapatan individu dan bukanlah pendapatan syarikat.
>
> 2.2.2 Keputusan ini dibuat berlandaskan kepada layanan cukai yang di amalkan oleh Ketua Pengarah berasaskan kepada peruntukan Statutori Akta 53, yang memperuntukkan dengan jelas kuasa-kuasa Ketua

Pengarah seperti yang terkandung di bawah peruntukan Seksyen 140, Seksyen 91 atau Seksyen 65 Akta 53 tersebut. Fakta dan merit kes telah menunjukkan bahawa perjanjian yang ditandatangani adalah antara hospital pakar swasta dan doktor pakar adalah merupakan perjanjian untuk perkhidmatan (contract for service).

2.2.3 Sehubungan dengan itu, dengan mengguna pakai peruntukan Akta 53, Ketua Pengarah mempunyai kuasa statutory untuk mengabaikan pendapatan yang diterima oleh doktor pakar melalui Syarikat Sdn Bhd dan seterusnya membangkitkan taksiran atas pendapatan individu doktor pakar berkenaan.

[9] Even though the decision of the DGIR was conveyed to MMA, the applicants commenced this review proceeding as they would also be affected by the decision of the DGIR as their case falls squarely within the ambit of the decision.

[10] However, on 14 November 2016, the doctor had entered into a service agreement with the company, whereby it was agreed that the company, as the employer had engaged the doctor, as the employee, to provide medical consultancy services as a physician to the hospital.

The Findings Of The Court

[11] In *Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor* [1999] 4 CLJ 121; [1999] 3 MLJ 515, Justice KC Vohrah adopted Lord Diplock's classification of grounds of judicial review in the House of Lord's case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. The three grounds described by Lord Diplock are:

(i) illegality;

(ii) irrationality; and

(iii) procedural impropriety.

[12] By illegality as a ground for judicial review, it means "that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it" and that "... the authority concerned has been guilty of an error of law in its action as for example, purporting to exercise a power which in law it does not possess".

[13] By irrationality, it means '*Wednesbury* unreasonableness' and "applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided upon could have arrived at it".

[14] By procedural impropriety, it includes "failure by an administrative tribunal to observe procedural rules that are expressly laid out ..." and "duty to act fairly".

[15] Bearing in mind the above principles, the issues raised by the applicants are as follows: A

(i) that the decision amounts to an error of law, as it is premised upon erroneous and invalid grounds;

(ii) arbitrary and unfair treatment of the applicants; B

(iii) breach of the applicants' legitimate expectation; and

(iv) retrospective punishment of the applicants is in breach of art. 7(1) of the Federal Constitution.

Issue (i) - Error Of Law C

[16] The applicants take the position that the DGIR has committed an error of law, as the decision is flawed and defective based on the following reasons:

(i) that the respondent had failed to appreciate that medical practitioners are authorised or permitted by law, to incorporate a company or body corporate to carry on business as medical practitioners and to provide medical services. In any event, the arrangement is/was in accordance with generally accepted business practices and was, at all material times, approved by the respondents; D

(ii) that in the present case, the respondent had failed to appreciate that whilst the resident consultant agreement was entered into between the JSHSB and the doctor, the doctor was in fact acting at all material times for and on behalf of the company, as confirmed by the fact that the monies received from patients seen by the doctor were paid over by the JSHSB to the company; E F

(iii) that consequently, pursuant to s. 3 and s. 66 read together with s. 2 of the ITA 1967, it is the company and not the doctor who is chargeable and assessable to income tax in respect of the aforesaid monies received from the patients; and

(iv) that in the circumstances, the respondents have acted unlawfully and *ultra vires* the ITA 1967 in treating the arrangement as a tax avoidance arrangement and in ruling that the income tax received by the company should be taxed under s. 4(a) of the ITA 1967, as individual income and not company income. G H

[17] This case calls for an interpretation of the resident consultant agreement, that was entered into by the doctor and JSHSB. The guiding principle on the construction of a contract can be found in the decision of the Federal Court in *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, where the court held that the most I

recent statement of the guideline to interpretation of contract is to be found in *Attorney General of Belize & Ors v. Belize Telecom Ltd* [2009] UKPC 10 and quoted Lord Hoffman at p. 297 (CLJ); p. 621 (MLJ):

> **The court has no power to improve upon the instrument which is called upon to construe, whether it be a contract,** a statute or articles of association. **It cannot introduce terms to make it fairer or more reasonable**. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed ... It is this objective meaning which is conventionally called **the intention of the parties**, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
>
> (emphasis added)

[18] Bearing in mind the abovementioned principle, in order to ascertain the intention of the parties, we need to look at the salient terms of the resident consultant agreement.

[19] Under the terms of the resident consultant agreement, the hospital had offered the doctor to conduct his professional practice at the hospital in consideration for fees and chargeable, payable by the doctor to the hospital, under cl. 5, which *inter alia*, reads:

> Clause 5: GRANT OF HOSPITAL PRIVILEGES
>
> 5.1 The Company hereby grants the following licenses and privileges to the Consultant at the Hospital pursuant to and subject to the terms of this Agreement:
>
> 5.1.1 The right to carry on his profession as a consulting medical specialist in the discipline he is specialised in ....
>
> 5.1.2 The right of exclusive occupation of all areas forming the Suite ...
>
> 5.1.3 Rights in common with the Company's employees, ... use of the utilities provided ...
>
> 5.1.4 ....
>
> 5.1.5 ....
>
> 5.2 Payment by the Consultant
>
> The following payment shall be payable by the Consultant:
>
> 5.2.1 Rental Charges
>
> ....
>
> 5.2.2 Payment for Hospital Privileges ...

[20] As for the medical services rendered by the doctor at the hospital, JSHSB will pay all the money so received by the doctor from his patients. This is clearly provided for under cl. 8.4 of the resident consultant agreement, which reads:

> Clause 8: OBLIGATIONS OF THE COMPANY
>
> The Company binds and obligates itself to the following in respect of the Hospital:
>
> 8.1 Reasonable Standard and Quality
>
> 8.2 Maintenance of the Hospital
>
> 8.3 Keep Proper Records
>
> 8.4 Payment of Monies
>
> The Company shall pay over all monies so received, in respect of the first half of every month by the 22nd of the relevant month and in respect of the second half of the month by the seventh day of the subsequent month or by the end of the period of stay of the inpatient concerned, whichever is later, and such money shall be paid without any deduction except for the payment of such amount as had been agreed herein to be paid by the Consultant pursuant to Clause 5.2 above or under any other agreement.

[21] The resident consultant agreement was signed by the doctor and JSHSB. Having considered the relevant clauses in the resident consultant agreement, I agree with the DGIR's stand that the doctor had signed the said agreement in his personal capacity. The resident consultant agreement allows the doctor to practice his profession as a registered specialist medical practitioner at the hospital, subject to payment of rental fees and payment for hospital privileges.

[22] For the medical services that the doctor had rendered to his patients, he is entitled to such payments and cl. 8.4 provides that JSHSB will pay all the monies received for the medical services rendered. Therefore, when the agreement for services was clearly made between the doctor and JSHSB, then all monies and payments from the patients under the resident consultant agreement rightly belonged to the doctor. Since all the monies and payments that arise from the resident consultant agreement belonged to the doctor, consequentially all taxes derived from the income of the practice at the hospital is taxable under the doctor as individual income, not the company's income.

[23] However, the applicants take the position that whilst the resident consultant agreement was entered into between the doctor and JSHSB, the doctor was in fact acting for the company at all material times. This can be seen from the service agreement dated 14 November 2016 and from the fact that the monies received from the patients seen by the doctor at the hospital, were paid by JSHSB to the company.

[24] With regards to the service agreement entered into between the doctor and the company, this is not a relevant consideration as it was only executed on 14 November 2016, whereas the DGIR's letter was dated 9 September 2016.

[25] In any event, with regards to the payments of professional fees made by JSHSB to the company instead of to the doctor, I am of the considered opinion that the said payments made were only an arrangement that was agreed to by the parties, but it cannot detract away from the fact that it was the doctor (in his personal capacity), who has entered into the resident consultant agreement with JSHSB. The payments were for the services rendered by the doctor at the hospital, pursuant to the resident consultant agreement. As to how the payments were transmitted by JSHSB is up to the parties' arrangements, but it does not change the character of the payments made, that is, for the medical services rendered by the doctor to his patients at the hospital pursuant to resident consultant agreement.

[26] In *Comptroller-General Of Inland Revenue v. Lim Foo Yong Sdn Bhd* [1982] CLJ 459; [1982] CLJ (Rep) 76, the Federal Court had applied the principle laid down in the English case of *Commissioners of Inland Revenue v. Wesleyan & General Assurance Society* (1946) 30 TC 11, where the court is to look at the real character of the payment, and not the label that the parties have given it. Justice Salleh Abas FCJ held as follows:

> As the supposed doctrine of substance is only a matter of construction, the following passage in the judgment of Lord Greene MR in *Commissioners of Inland Revenue v. Wesleyan and General Assurance Society* 30 TC 11, 16 is very relevant:
>
> > It is perhaps convenient to call to mind some of the elementary principles which govern cases of this kind. *The function of the Court in dealing with contractual documents is to construe those documents according to the ordinary principles of construction, giving to the language used its normal ordinary meaning save in so far as the context requires some different meaning to be attributed to it. Effect must be given to every word in the contract save in so far as the context otherwise requires.*
>
> Another principle which must be remembered is this. *In considering tax matters a document is not to have placed upon it a strained or forced construction in order to attract tax, nor is a strained or forced construction to be placed upon it in order to avoid tax. The document must be construed in the ordinary way and the tax legislation then applied to it. If on its true construction it falls within a certain taxing category, then it is taxed. If on its true construction it falls outside the taxing category, then it escapes tax.*
>
> The Special Commissions applied the above principle and came to the conclusion that these three documents constitute a sale, a lease and an agreement to repurchase the properties. The construction of these documents does not only involve a matter of the words or form used in the agreements but above all the method employed by the parties in the transaction. The *modus operandi* adopted was clearly based upon the

assumption that it was a sale. Thus there is no way in which the Special Commissioners could find the transaction to be otherwise, short of tearing off these documents or ignoring them altogether.

As to the respondent's explanation that the transaction was documented in the form of sale rather than of loan because of certain legal technicalities and benefits we do not think that they only amount to a motive which had no effect on the legal consequence. It may well be that sale was entered into instead of a loan, because the EPF Board had also no power to run and invest in a hotel business. Thus technicalities cut both ways, and in any case motive is completely irrelevant.

We therefore think that the Special Commissioners' finding that the transaction with the EPF Board was a sale was correct. (emphasis added)

[27] In this case, I am of the considered opinion that the DGIR had complied with the above principle of construction, giving the resident consultant agreement its ordinary meaning, in that the said agreement is a contract for service between the doctor and JSHSB, where the doctor will pay for the rental of his clinic at the hospital and will receive payments from his patients in consideration of his professional service. There is no forced construction to the said agreement in order to attract tax. But if we are to read the service agreement into it, or to read into it the manner in which payments were made to the company instead to the doctor, then we will be giving it a strained or forced construction, in order to avoid tax.

[28] In any event, s. 140 of the ITA 1967 empowers the DGIR to disregard certain transactions, (in this case the monies being paid to the company and not to the doctor by JSHSB). Section 140 reads:

Power to disregard certain transactions

140. (1) The Director General, where he has reason to believe that any transaction has the direct or indirect effect of:

(a) altering the incidence of tax which is payable or suffered by or which would otherwise have been payable or suffered by any person;

(b) relieving any person from any liability which has arisen or which would otherwise have arisen to pay tax or to make a return;

(c) evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by this Act; or

(d) hindering or preventing the operation of this Act in any respect.

may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction.

[29] The application of s. 140 was considered by the Court of Appeal in the case of *Syarikat Ibraco - Paremba Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2015] 10 CLJ 114; [2017] 2 MLJ 120, where the court held as follows:

> [28] The distinction between what is accepted and what is not in the way of reducing the amount of tax to be paid used to be conveniently described by the terms tax avoidance and tax evasion respectively. Section 140(1)(c) of the Act in particular, has the effect of demolishing that convenient description. *The Act now empowers the Director General, without prejudice to such validity as it may have in any other respect or for any other purpose, where he has reason to believe that any transaction has the direct or indirect effect of evading or avoiding any duty or liability which is imposed or would otherwise have been imposed on any person by the Act, to disregard or vary the transaction and make such adjustments as he thinks fit with a view to counteracting the whole or any part of any such direct or indirect effect of the transaction*. Thus the oft quoted words of Lord Tomlin in *IRC v. Duke of Westminster* [1936] AC 1 and quoted by Lord Templeman in *Commissioner of Inland Revenue v. Challenge Corporation Ltd (supra)* that every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be is now only partially true, for whether he succeeds or not, according to s. 140(1)(c), depends upon the determination of the Director General. We make the observation that it is for the taxpayer to demonstrate that the transaction or the arrangement by which the income was produced was so preordained by compliance with the requirements of law or accepted business practices to limit risk exposure, and that the tax savings were purely incidental.
>
> (emphasis added)

[30] In this case, the issue is on the construction of the resident consultant agreement, whether it is the doctor or the company who is taxable for the income derived under the said agreement. Therefore, there is no issue with regards to whether the medical practitioners are authorised or permitted by law to incorporate a company or body corporate to carry on business as medical practitioners and to provide medical services.

[31] Therefore, premised on the reasons enumerated above, on the construction of the resident consultant agreement, I find that the DGIR has applied the correct principles in the construction of the same, when he finds that based on the said agreement and pursuant to the ITA 1967, it is the doctor and not the company, who is chargeable and assessable to income tax in respect of the aforesaid monies received from the doctor's patients.

Issue (ii) Arbitrary And Unfair Treatment Of The Applicants

[32] It is the submission of the applicants that the DGIR's decision is unfair and discriminatory as the said decision does not apply to other categories of specialist doctors, general practitioners in private medical clinics, architects and engineers.

[33] The decision cannot be said to have been made arbitrarily as from the DGIR's letter itself, there were discussions with the MMA. Added to that, the decision was made based on the applicant's own documents and the DGIR's construction of the same.

[34] With regards to the other categories of professionals given a different treatment, there are no documentations before this court as to whether their contracts are the same as the applicants herein. It must be emphasised that the DGIR will only look at each taxpayer's own documents on the issue of taxes and each case will be assessed on its own merits.

Issue (iii) Breach Of The Applicants' Legitimate Expectation

[35] The applicants submit that premised on the principle of legitimate expectation, the respondents are bound by the respondents' own tax audit frameworks and its audit on the second applicant in 2013.

[36] The tax audit framework provided that the objective of tax audit is to ensure the correct amount of tax has been reported and the right amount of tax has been paid, and that once an audit case is settled, the audit should not be repeated on the same issues for the same year of assessment.

[37] However, the 2013 audit on the second applicant is not on the tax treatment practiced by the applicants, but rather on the issue of expenses claimed by the applicant, that is the expenses for petrol, parking and toll, filing fees, telephone bills, travelling expenses and printing stationery.

[38] In any event, s. 91(1) of the ITA 1967 allows the DGIR to raise any assessment or additional assessment if the DGIR is of the opinion that no tax or sufficient tax has been made, and this will include departing from the existing practice and adopting a different form of assessment. In *Government of Malaysia v. Sarawak Properties Sdn Bhd* [1994] 1 CLJ 514; [1984] 1 MLJ 14, Justice Chong Siew Fai held as follows:

> ... It cannot be doubted that the Director of Inland Revenue and his subordinate officers down to those charged with the due administration of the Act are holding public offices (s. 134 of the Act) and, in carrying out their tasks of assessing taxes under the Act, are performing public duties. *As such, the doctrine of estoppel by record does not apply to them in that they cannot, by issuing a letter such as Exh. CSC-2, be estopped from subsequently exercising a power or discretion which it is their duty to exercise* ...
>
> ...
>
> In my opinion, the question of the applicability of estoppel against the Crown does not necessarily depend on the existence of any mistake on the part of revenue officers but rests on the broader basis as to whether the Crown is bound by representations and conduct of the officers of the Inland Revenue irrespective of the presence or otherwise of any mistake.
>
> .....

Lastly it was contended for the defendant that since the plaintiff had, for the years of assessment 1981 - 1985 (both inclusive), agreed to and accepted what was called "the completed contract" method of accounting adopted by the defendant respecting the same project and had assessed taxes on that basis, the plaintiff was estopped from changing to a new method (known as "percentage completion method") to assess the tax respecting the year of assessment 1986 in relation to the same project.

With respect I am unable to agree to the contention. *The fact that the Revenue Department had accepted or adopted certain method in assessing tax does not preclude it from departing from the existing method or practice and changing its opinion by adopting a different form of assessing. Pethaperumal Chettiar v. C.I.T.* [1943] 1 TR 532, 538.

The **doctrine of *res judicata* does not apply to the decisions of income tax commissioners**. *Patuck v. Llyod (Inspector of Taxes)* [1944] 26 TC 284 at 292 CA. (emphasis added)

[39] The above principle was applied by the Court of Appeal in *Teruntum Theatre Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2006] 3 CLJ 123; [2006] 4 MLJ 685, where the court held as follows:

[18] Estoppel is a rule of evidence which can only be invoked in special circumstances. The estoppel relied upon by the taxpayer against revenue in this case is that of estoppel *in pais*, i.e., estoppel by words or conduct. In our view the Special Commissioners were not wrong to reject the suggestion that the assessment by the respondent of a taxpayer under the RPGT was an irrevocable act. *Estoppel cannot be invoked against the Director General of Income Tax when he is put to notice that an incorrect assessment has been made under the RPGT. The Director General cannot raise an estoppel against himself from discharging his statutory duty to raise a correct assessment under the appropriate law if the basis of treating the gain as a capital gain was not within the meaning ascribed to it by the RPGT and no real property gains tax is payable. In such a situation the Director General is not absolved from discharging his duty of raising the correct assessment in accordance with the relevant law*. No person can raise an estoppel against himself so as to defeat a positive duty imposed upon him by a statute (*Maritime Electric Co. Ltd v. General Diaries Ltd.* [1937] AC 610 at pp. 620-621). The duty of both parties, the Director General and the taxpayer, is to obey the law. (emphasis added)

Issue (iv) Breach Of Art. 7(1) Of The Federal Constitution

[40] The applicants submit that there had been a breach of art. 7 of the Federal Constitution as the DGIR's decision amounts to punishing the applicants for implementing the arrangement, which was neither illegal nor invalid when it was made back in 2002.

[41] I do not appreciate this argument and the relevance of art. 7, which is on double jeopardy in criminal cases. However, as the cases are very clear that the DGIR can adopt a different form of assessing tax, this is clearly a non-issue.

Conclusion

[42] Premised on the reasons enumerated above, I am of the considered opinion that the decision of the DGIR is legal as it is premised on the construction of the resident consultant agreement. The ITA 1967 empowers the DGIR to raise any assessment or additional assessment, and the DGIR is not estopped from adopting a different form of assessing tax. Therefore, I find no merit in the application and the same is dismissed with costs.